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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ICALL, INC., a Delaware-incorporated Corporation Licensed to do Business in California,	}	Case No.: SACV 11-00895 JVS (ANx)
Plaintiff,		DECLARATION OF ARLO GILBERT
vs.		IN SUPPORT OF PLAINTIFF'S
JULIAN CAIN and ORCHID SEED, LLC,		CORRECTED MOTION FOR ENTRY
a California Limited Liability Company,		OF DEFAULT JUDGMENT AND
Defendants.	}	PERMANENT INJUNCTION AND
	}	IMPOUNDMENT ORDER AGAINST
	}	DEFENDANTS

**DECLARATION OF ARLO C. GILBERT**

Arlo C. Gilbert declares:

1. I am the CEO of iCall, Inc. ("iCall"), and make this declaration in support of iCall's Motion for Entry of Default Judgment Against Defendants based on personal knowledge and an informed review of relevant documents, and if called as a witness I could and would so competently testify.

2. iCall is a self-funded startup company that operates as an FCC-licensed telecommunications provider authorized to operate as a Community Local Exchange Carrier. I am the founder of iCall, and along with co-founder Andy Muldowney, created the computer code that iCall uses to provide a Voice-Over Internet Protocol ("VoIP") calling platform that operates on desktop computers, the Apple iPhone, and the iPod. iCall also offers wholesale VoIP solutions through iCall®Carrier Services. iCall, Inc. offers the iCall® Service in both free and paid versions. iCall is incorporated in Delaware and has its main office in Dallas, Texas.

1       3. The iCall® software operates on desktop computers and on the Apple iPhone  
2 and iPod. iCall, Inc. offers the iCall® Service in both free and paid versions, and offers  
3 wholesale VoIP solutions through iCall® Carrier Services.

4       4. iCall products and services are offered primarily through the company website at  
5 iCall.com.

6       5. iCall has zealously protected its intellectual property, including the iCall®  
7 trademark, the iCall California Service Mark, and the iCall® software. iCall is zealous in  
8 protecting its intellectual property of all types. iCall owns the incontestable federal  
9 trademark on the iCall® mark, Registration No. 2,194,066, registered October 6, 1998 on  
10 the principal register for use in connection with telephone communications services,  
11 including aural and optical information transmission. I have also filed a patent  
12 application for iCall's proprietary technology that is pending with the United States  
13 Patent and Trademark Office ("USPTO") under Application Number 11/625,684, and for  
14 international patent registration through the World International Property Organization  
15 ("WIPO").

16       6. VoIP offers considerable cost savings for users over standard telephone service.  
17 iCall has harvested substantial recognition in the technical and popular press for its  
18 repeated technical "coups," becoming, for example, the first VoIP company to offer an  
19 Apple-approved iPhone "App" that not only works on the iPhone, but also converts the  
20 iPod Touch media player into a wireless telephone set that can make international calls.  
21 iCall is dedicated to remaining at the forefront of VoIP technical development through  
22 leading-edge research and development; however, as a self-funded startup, iCall operates  
23 within a limited budget.

24       7. iCall's largest competitor in the VoIP field is Skype. iCall and Skype software  
25 are not interoperable. Skype's software is proprietary, not open source. When iCall  
26 decided to create an interoperability platform to connect iCall and Skype users over the  
27 Internet, it faced the fact that neither Mr. Muldowney nor I, nor any of iCall's employees,  
28 had the software coding ability to create an interoperability platform between iCall and

1 Skype. Accordingly, it was necessary to find a computer coder with skill in this field. I  
 2 researched extensively to locate appropriate candidates and found only two, one a  
 3 gentleman with whom I met in Europe, whose research demonstrated he could create a  
 4 iCall-to-Skype interoperability platform, but demanded an exorbitant fee to perform the  
 5 work that was far beyond iCall's capacity to pay. The second person was a man whom I  
 6 never met in person, but whose work demonstrated to me that he too could create an  
 7 iCall-to-Skype interoperability platform. That person was known to me as Julian Cain. I  
 8 say "known to me" because based on work performed by an investigator retained by  
 9 iCall's attorney, I understand his true name is Ashley Julian Cain, usually listed in public  
 10 records as Ashley J. Cain. I will refer to him as "Cain" in this declaration.

11 **8.** After a cordial arms-length negotiation, Cain agreed to write the code for an  
 12 iCall-to-Skype interoperability platform that is referred to herein as the iCall Open Peer  
 13 Platform ("iCOPP" or the "iCOPP interface"). We agreed that the code would be a work-  
 14 for-hire that would work seamlessly with and complement the iCall® software code Mr.  
 15 Muldowney and I had already created as a joint work. During development, Cain usually  
 16 referred to the iCOPP interface as "SkyLib," an abbreviation for "Skype Library."

17 **9.** Attached hereto as **Exhibit A** is the Work-Made-for-Hire Agreement(the  
 18 "Work-for-Hire Agreement") to which Cain and iCall mutually agreed. I signed on behalf  
 19 of iCall and Cain signed on his own behalf. The iCOPP interface is defined as the  
 20 "Product" in Section 1(a), quoted in relevant part as follows:

21 "The 'Product' means a platform-independent C++ library to interconnect  
 22 with Skype that will be functional in Linux in its first iteration, and suitable  
 23 for back-porting to other platforms."

24 iCall has always treated the iCOPP interface development project as a trade  
 25 secret, and took all reasonable steps to protect the iCOPP interface code from disclosure.  
 26 The iCOPP code has economic value precisely because how to achieve Skype  
 27 interoperability is not publicly known, and iCall has always sought to preserve that  
 28 economic value by exercising all reasonable precautions to keep the iCOPP code a secret.  
 In ¶ 9 of the Work-for-Hire Agreement, Cain agreed that the iCOPP code was to be

1 written as a work-for-hire, and that iCall would be designated as the “Author” in the  
2 copyright registration. In ¶ 10, Cain agreed that the iCOPP code is the property of iCall.  
3 In ¶ 16, all software to which Cain was given access by iCall, including the iCOPP code,  
4 was designated as “Confidential Information.” In subsection (e) of ¶ 16 Cain agreed to  
5 return all confidential information and materials to iCall upon termination of the  
6 contracting relationship, and in subsection (f) of ¶ 16, Cain agreed that he was “in a  
7 position of confidence and trust” that imposed a duty to maintain the confidentiality of  
8 the iCOPP code. Aside from the unpermitted disclosures that Cain said he has made,  
9 iCall has never disclosed the iCOPP code to anyone outside of the iCall development  
10 team, who have all be enjoined to secrecy by internal agreement.

11 **10.** Pursuant to the Work-for-Hire Agreement, iCall paid Cain a \$5,000 starting fee  
12 as an “incentive to begin work by the Start Date” of October 20, 2010.

13 **11.** Once Cain had begun work, he was to bill at the rate of \$65/hr. Cain estimated  
14 he could complete the code-writing project within eight forty-hour work weeks.

15 **12.** Pursuant to the Agreement, **Exhibit A**, ¶ 10, iCall owns the iCOPP interface,  
16 and Cain may “not retain code written under this contracting relationship after the  
17 termination of the relationship.”

18 **13.** Cain also agreed in **Exhibit A**, ¶¶ 17 and 18, that he would “not assist any party  
19 other than Client to develop any VoIP-related product that shall facilitate interoperability  
20 with Skype,” and that he would not “attempt to solicit any business or trade from [iCall’s]  
21 actual or prospective customers or business contacts,” or “attempt to divert business away  
22 from [iCall].”

23 **14.** Cain started work on October 21, 2010, and submitted bills for his work that  
24 were promptly paid in full on October 31, 2010 and November 13, 2010.

25 **15.** Cain then engaged in a three-week work stoppage, claiming sickness, and then  
26 on December 8, 2010, Cain revealed his true intentions in an email to me, a true and  
27 correct copy of which is attached as **Exhibit B**, and quoted for the Court’s convenience  
28 below:

1        ***“I believe it’s time to re-negotiate our contract. Since my downtown***  
 2        ***[sic] I have received numerous offers to integrate the Skype protocol***  
 3        ***into software and hardware devices. These competitors have made***  
 4        ***offers from four times to 100 times the hourly rate that iCall is***  
 5        ***providing in compensation. I have also received buyout offers of***  
 6        ***\$185,500.00 and 2.25 million respectively to hand over all of my***  
 7        ***research, code, with agreement to not work with anyone else on this***  
 8        ***technology.***

9        Having said that 65 per hour is no longer sufficient and with another  
 10        child on the way you must understand that income is a priority for me.

11        This technology is worth billions and these competitors have driven  
 12        this fact home.

13        ***Think this over and please see how you'd like to proceed if at all.”***

14        (Exhibit B, emphasis added.)

15        16. When Cain presented his demand to “renegotiate” the contract, iCall had already  
 16        invested \$80,000 in the contract and had staked much of its development and capital-  
 17        raising planning on developing the iCOPP interface. Further, because of Cain’s unique  
 18        ability to create the iCOPP interface, iCall had no alternative source of programming  
 19        talent to complete the iCOPP interface. Cain subjected iCall to economic duress, and the  
 20        only option was to accede to his demands.

21        17. Accordingly, on December 17, 2011, iCall paid Cain additionally compensation  
 22        to meet his demands: (a) \$10,000 to restart work, and (b) effective December 30, 2010,  
 23        \$260/hr, four times his contractually-agreed hourly rate.

24        18. Cain resumed work on the iCOPP interface in late December 2010, after  
 25        receiving the additional \$10,000 payment.

26        19. Over the next eight weeks, Cain collected payment for an aggregate 127 hours of  
 27        work at his quadrupled hourly rate, for which iCall made payment made on December 30,  
 28        2010, January 14, 2011, January 31, 2011 and February 18, 2011.

29        20. All payments to Cain were made by the iCall bookkeeper by check to Julian  
 30        Cain sent to 3904 North Druid, Decatur, Georgia 30033 (the “Decatur address”).

31        21. iCall made the last payment to Cain on February 18, 2011, in the amount of  
 32        \$6,500, despite the fact that Cain had not submitted any new work product to the iCall

1 collaboration website where Cain was supposed to upload his work and record his hours.  
 2 I made mention of this to Cain in an email, and he responded via email to say that the  
 3 failure to upload new work and hourly time records was an oversight; however, after that  
 4 email, Cain cut off all communications with me and all other iCall employees.

5 **22.** On June 9, 2011 Cain sent me an email, a true and correct copy of which is  
 6 attached hereto as **Exhibit C** with the Subject line "Skype-like" attaching numerous  
 7 "screenshots" of VoIP software in action that his email says is "Skype-interoperable." I  
 8 quote Cain's June 9<sup>th</sup> email in relevant part as follows:

9 "Arlo, What would you do with this technology?

10 [Reply from Arlo Gilbert] What do u suggest?

11 [Reply from Cain] I'm just curious as to what you'd do with it. I'm  
 12 wanting to deploy it and compete w/ skype."

13 **23.** Four days later, on June 13, 2011, Cain sent me an email, a true and correct  
 14 copy of which is attached hereto as **Exhibit D**, from which I quote in relevant part as  
 15 follows:

16 "I've built the login code (c++). Skype put me in the corner with 5.0  
 17 but I've got it handled. Most everyone else seems to have given up on  
 this effort except a few of us. Do you want to finish the project?"

18 **24.** From these emails, I reasonably infer that Cain has completed or almost  
 19 completed the iCOPP interface, and is displaying his achievements in an effort to re-  
 20 initiate his cat-and-mouse game with iCall and extract yet more unearned compensation.  
 21 Although iCall has the sole lawful claim of ownership to the iCOPP interface, Cain is  
 22 threatening to breach the Work-for-Hire Agreement by selling, transferring or licensing it  
 23 to a third party. After I received Cain's June 13<sup>th</sup> email, I referred the matter to Mr.  
 24 Carreon to take legal action, and have had no further communications with Cain. In  
 25 order to pursue this litigation, iCall registered all the iCOPP code that had been delivered  
 26 by Cain prior to the above-described breach on an expedited basis, paying the expedited  
 27 registration fee of \$750. The U.S. Copyright Office issued iCall Registration # TXu 1-  
 28 739-380 for its authorship of the iCOPP code, a true copy of which is attached hereto as  
**Exhibit E.**

1       **25.** Regarding the current whereabouts of the iCOPP code, it is virtually certain that  
2 Cain has current copies of the iCOPP interface code and related evidence on his personal  
3 computers. Writing computer code does not require any specialized computer, and the  
4 iCOPP code could be stored on the hard drive to a laptop machine or a desktop machine,  
5 on an external storage drive, or on any type of digital storage medium.

6       **26.** The goal of engaging Cain to create the iCOPP code is to gain a “first mover”  
7 advantage in the field of Skype interoperability. At year-end 2009, Skype’s chief  
8 technology strategist Jonathan Rosenberg reported Skype had 560 Million registered  
9 users. Skype accounted for 12 percent of the world’s international calling minutes in  
10 2009.<sup>1</sup> More recent statistics indicate that in March of this year, Skype had 30,000,000  
11 users online at one time, and in May of this year, there were 3,500 downloads of the  
12 Skype program *per minute*.<sup>2</sup> The first VoIP company to establish interoperability with  
13 Skype, allowing its users to place Skype users in their own “contacts list” and call them  
14 directly, will harvest an enormous number of additional customer contacts, score a huge  
15 public relations coup, and enhance its customer goodwill exponentially. Additionally, the  
16 recent purchase of Skype by Microsoft was widely reported to be a disappointment for  
17 many Skype users, which presents an excellent opportunity for iCall to provide them with  
18 a bridge to a new service, if that new service is Skype-interoperable. These windows of  
19 opportunity are fleeting, however. “Catching the wave” of technological innovation by  
20 releasing a iCall-Skype interoperability platform such as the iCOPP code could increase  
21 greatly increase our company’s valuation. Indeed, it would not be hyperbole to say that  
22 the immediate deployment of the iCOPP code would likely increase iCall’s value  
23 astronomically. Conversely, the failure to recover the iCOPP code in Cain’s possession  
24 will cause irreparable harm, because it would be very difficult to prove the damages  
25 resulting from Cain’s misappropriation of the iCOPP code in a trial or arbitration  
26 proceeding. Further, even if damages could be assessed against Cain in the astronomical  
27

28 <sup>1</sup> <http://gigaom.com/2010/04/20/skype-q4-2009-number/>

<sup>2</sup> <http://skypenumerology.blogspot.com/>

1 amount that expert testimony would assign to the consequences of his breach, Cain lacks  
2 the resources to satisfy such a liability. Thus, the only meaningful remedy for his breach  
3 is an injunction compelling him to deliver the iCOPP code and all its derivative versions  
4 to iCall.

5 **27.** The damages that would be recovered in an arbitration proceeding against Cain  
6 would certainly vastly exceed \$75,000, as more than this amount has been paid to him  
7 since he signed the Work-for-Hire Agreement in October of last year, the terms of which  
8 he totally breached. When added to the attorneys fees incurred by iCall's counsel, the  
9 mere out of pocket costs already substantially exceed \$75,000. Accordingly, even  
10 making no allowance for an award of foreseeable consequential damages resulting from  
11 Cain's breach due to the loss of iCall's business opportunity, the amount in controversy  
12 and the likely arbitration award is well in excess of \$75,000.

13 **28.** By seeking an injunction to compel delivery of the iCOPP code, iCall is seeking  
14 to mitigate its damages. This will benefit Cain by reducing the amount of his liability.  
15 Accordingly, both parties will be benefited by this Court's timely issuance of an  
16 injunction as requested by iCall.

17 **29.** I hereby declare, pursuant to the provisions of 28 U.S.C. § 1746 (2), under  
18 penalty of perjury under the laws of the United States of America, that the foregoing is  
19 true and correct, and that this declaration was executed on August 25, 2011 at Dallas,  
20 Texas.

21 

DN:  
email=arlo@icall.com  
Date: 2011.08.25  
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22  
23  
24 Arlo C. Gilbert